

UNITED STATES OF AMERICA
Before the
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

Experimental Presorted)
Priority Mail Rate Categories, 2001)

Docket No. MC2001-1

OFFICE OF THE CONSUMER ADVOCATE
RESPONSE TO ORDER NO. 1306
(April 3, 2001)

Pursuant to paragraphs 3 and 4 of Order No. 1306,¹ the Office of the Consumer Advocate ("OCA") hereby submits comments on appropriate procedures to be followed in this docket. These comments address three points: (1) the Postal Service's motion for waiver of certain filing requirements, (2) the appropriateness of experimental treatment, and (3) the need *vel non* for "live" hearings on genuine issues of material fact.

Waiver of Filing Requirements

With its Request in this docket the Postal Service filed a motion for waiver of certain filing requirements.² This motion appears incomplete, as it does not request waiver of Rules 64(a), 67b, or 67c(a), which rules are also not addressed in the Postal Service's Compliance Statement.³ To the extent that the Postal Service has explicitly

¹ Notice and Order on Filing of Request for Establishment of Experimental Presorted Priority Mail Rate Categories, March 14, 2001, at 8.

² Motion of the USPS for Waiver of Certain Provisions of Rules 54 and 64, March 7, 2001.

³ See Request of the USPS for a Recommended Decision on Experimental Presorted Priority Mail Rate Categories, March 7, 2001, at Attachment F.

identified rules that it desires waived, the OCA does not oppose waiver. The OCA provides the following additional comments.

Rule 67c(a) sets forth the requirements for data collection plans. Data collection plans are really the heart of any experiment. Rule 67c(a) refers implicitly to Rule 67b, which refers explicitly to Rule 64(a). In essence, Rule 67b requires an explicit explanation of how the unavailability of data required to support a permanent rate or classification change justifies an experiment. And Rule 67c(a)(1) requires the Postal Service to “[d]escribe with particularity the means it proposes to employ to collect those [unavailable] data.”

Certainly the prefiled testimony of witness Levine addresses data collection during the experiment. But this testimony (as it relates to data collection) is vague and cursory.⁴ Vagueness with respect to data collection also appears in witness Levine's response to interrogatory OCA/USPS-T2-3(c). And witness Scherer's explanations for seeking experimental treatment are based on “uncertainties” concerning volume and cost that are, for the most part, well known.⁵ The one big uncertainty—termination of the Emory contract—would caution against any meaningful change in the Priority Mail rate structure at this time. And the cost consequences of terminating the Emory

⁴ See Testimony of Jonathan D. Levine on Behalf of USPS, USPS-T-2, March 7, 2001, at Attachment A.

⁵ Testimony of Thomas M. Scherer on Behalf of USPS, USPS-T-1, March 7, 2001, at 7-8. Witness Scherer identifies three “uncertainties” that need resolution before a permanent change can be justified. One is whether the new discount structure will generate more mailer interest than the old discount structure. But it is new *make-up requirements*, not a different rate structure, that is expected to attract greater mailer interest. Response of USPS Witness Scherer to Interrogatory OCA/USPS-T1-1, April 2, 2001. Since make-up requirements are not in the DMCS, designation of a DMCS change as experimental or permanent cannot affect this source of uncertainty. A second source of uncertainty identified by witness Scherer is flat/parcel proportions. But it is known that the only mailer witness Scherer discussed this experiment with mails 100 percent flats. Response of USPS Witness Scherer to Interrogatory OCA/USPS-T1-2, April 2, 2001.

contract do not require an experiment to evaluate. Those cost changes will show up in routinely collected data.

Appropriateness of Experimental Treatment

The OCA is not able at this time to take a position on the appropriateness of applying the experimental rules. The lack of an explicit compliance statement with respect to Rules 64(a), 67b, and 67c(a) makes it impossible to judge (1) what data cannot be provided without an experiment and (2) whether the proposed experiment will actually produce the missing data.

Necessity for Hearing

Irrespective of whether the Commission determines to apply the experimental rules, the OCA stands ready to expedite this docket. The OCA notes that at least two parties have already requested a hearing in their notices of intervention.⁶ The OCA suggests that the Commission accelerate the hearing process by dispensing with oral cross-examination of witnesses.

The Administrative Procedure Act ("APA"), which governs Commission proceedings, requires a full and true disclosure of the facts. "Live" cross-examination may not be needed if full and true disclosure of the facts can be otherwise accomplished. Other federal regulatory agencies routinely conduct "paper" hearings, and the courts have upheld such proceedings against APA challenges. For example, the D.C. Circuit has stated, "Cross-examination is . . . not an automatic right conferred by the APA; instead, its necessity must be established under specific circumstances *by*

⁶ Notice by United Parcel Service of Intervention Under Commission Rule 20, March 30, 2001; Notice of Intervention by Parcel Shippers Association, March 27, 2001.

the party seeking it."⁷ The same court has also examined whether the "abbreviated nature" of a FERC proceeding violated due process.⁸ In that case, FERC had dispensed with oral cross-examination on the ground that "[t]rial-type proceedings . . . are necessary only when 'a witness' motive, intent, or credibility needs to be considered' or 'when the issue involves a dispute over a past occurrence.'" The court upheld FERC.⁹

Respectfully submitted,



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⁷ Cellular Mobile Systems v. FCC, 782 F.2d 182, 198 (D.C. Cir. 1985) (emphasis added).

⁸ Louisiana Ass'n of Independent Producers v. FERC, 958 F.2d 1101, 1113 (D.C. Cir. 1992).

⁹ *Id.* at 1113-14.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the rules of practice.


Stephanie Wallace

Washington, D.C. 20268-0001
April 3, 2001